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THOW CHOW GOON &amp; ANOR.

v.

KHOR KAR CHOOI &amp; ANOR.

SUPREME COURT, KUALA LUMPUR

HARUN HASHIM SCJ

*b*

MOHD. AZMI SCJ

AJAIB SINGH SCJ

[CIVIL APPEAL NO. 258 OF 1988]

18 OCTOBER 1989

*c*

**CHILDREN AND YOUNG PERSONS:** *Appeal against adoption order - Infant boy - Whether natural parents had withheld consent unreasonably - Welfare of infant considered.*

This is an appeal against the granting of an adoption order by the natural parents of an infant boy.

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The infant was one of a pair of twins born to a Chinese couple. The infant was given to be adopted to a building contractor with whom the natural father was employed. An adoption ceremony was performed at which the natural parents of the infant, who was then 4 months old, were present. The natural father played with the infant everyday as his workplace was where the infant lived, but never took him away. The natural mother visited the infant once a month or once in every three months.

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After two years of this arrangement, the natural parents changed their minds and asked for the return of the infant. The foster parents refused. The foster parents applied to the High Court for an adoption order which was granted and hence this appeal.

The issue in this case is whether the natural parents have withheld their consent to the application unreasonably.

**Held:**

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[1] There are no grounds why the foster parents should be preferred to the natural parents from the point of view of the welfare of the infant.

[2] In this case the natural father did not lose touch with the infant. The natural mother visited him when he was in the welfare home by order of the Court before the hearing and the infant was “not frightened or felt uncomfortable with her”.

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[3] The change of surroundings will not be disruptive in the instant case. The infant is being taken back by his natural parents and is to be brought up together with his twin sister.

[4] The appeal is allowed with costs and the order of the learned Judge is set aside. The infant is ordered to be returned to the natural parents with access to the foster parents under the supervision of a Welfare Officer.

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*[Appeal allowed with costs.]*

**Cases referred to:**

*O'Connor v. A & B* [1971] 1 WLR 1227

*Re PA (an Infant)* [1971] 115 SJ 586

**Legislation referred to:**

Adoption Act 1952, ss. 5(1), 6(b)

*i*

*For the appellants - Teja Singh Penesar; M/s. Yahaya & Teja*

*For the respondent - Tan Beng Hong (Lee Boon Ten with him); M/s. B.T. Lee & Co.*

### JUDGMENT

#### Harun Hashim SCJ:

On 20 July 1983 a pair of twins were born to a Chinese couple. The father (born in 1954) was a goldsmith and also worked as a construction labourer. The mother (born 1957) was a housewife. The couple's first child is a girl who was born on 9 April 1982. One of the twins is a boy (the infant) and the other, a girl. The infant was born with two teeth. According to Chinese superstition such a child would be difficult to bring up and so, soon after the birth, the infant was given in the care of the mother of a friend of the father.

As a construction labourer, the father worked for a building contractor (born in 1931) who lived with his wife (born in 1944). They have six children of their own whose ages at the material time ranged from 23 years to 3 years; all of whom except for the eldest lived with their parents. The contractor agreed to adopt the infant. So, on 11 November 1983 an adoption ceremony was performed at the temple of the goddess of Mercy in Pitt Street, Penang at which the natural parents of the infant were present. The infant was then less than 4 months old and lived with the foster parents from then on. The natural father played with the infant everyday as his workplace was where the infant lived but never took him away. The natural mother visited the infant once a month or once in three months.

These are the facts as found by the learned Judge and we have no reason to disturb his findings. He concluded in his judgment as follows:

I am satisfied that when the boy was placed in their care it was for the express purpose of adoption - no doubt an adoption according to Chinese custom - but a *de facto* adoption nevertheless. It is highly improbable that Chinese parents who believe strongly in the preservation of the family name would give away their only son - a four month old boy - unless there was some cogent reason for doing so.

We agree.

After about two years of this arrangement, the natural parents on 23 April 1986 changed their minds and asked for the return of the infant. The foster parents refused. Relations between them became strained and as a result the natural father ceased to work for the foster father. Finally on 23 June 1986, the foster parents applied to the High Court at Penang for an adoption order. The natural parents opposed the application and withheld consent. The learned Judge granted the application. Hence this appeal.

The only issue in this case is whether the natural parents have withheld their consent to the adoption application unreasonably. The decision of the Court whether or not it should dispense with parental consent on the ground that it is being unreasonably withheld must depend upon the facts of the individual case. The scheme of the Adoption Act 1952, is that no adoption order shall be made without the consent of the natural parents. There are, of course, exceptions. Section 5(1) of the Act provides:

Save as hereinafter provided in this section, an adoption order shall not be made except with the consent of every person or body of persons who is a parent or guardian of the child in respect of whom the application is made or who is liable to contribute to the support of the child and an adoption order shall not be made upon the application of one or two spouses without the consent of the other of them:

- a** Provided that the Court may dispense with any consent required by this section if satisfied:
- (a) in the case of a parent or guardian of the child, that he has abandoned, neglected or persistently ill-treated the child;
  - (b) in the case of a person liable as aforesaid to contribute to the support of the child, that he has persistently neglected or refused so to contribute;
- b** (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld; or
- (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld; or
- (d) in any case, that in accordance with the provisions of any written law relating to the adoption of children for the time being in force in any country any competent authority
- c** has given permission or granted a licence authorizing the care and possession of the child to be transferred to the applicant.

Section 6(b) further provides:

- that the order if made will for the welfare of the child, due consideration being for this purpose given to the wishes of the child, having regards to the age and understanding of the child;
- d**

The exception for consideration in this case is that provided by proviso (c) to s. 5(1). The learned Judge, quite rightly, considered all relevant facts, including:

- (a) The ages of the foster parents and the natural parents although we are inclined to think that the younger ages of the natural parents would place them in an advantageous position to be more actively engaged in bringing up the infant especially at play.
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- (b) The living conditions of the two parents. The foster parents live in a rented old double-storey terrace house part of which is used as an office for the foster parents' business. There are 11 occupants in the house and according to the Welfare Officer the house is quite congested. On the other hand the natural parents live in a flat which they purchased in 1981. Both houses have piped water and electricity.
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- (c) The income of the parents. The foster father has actually retired and has handed over the contracting business to his eldest son but continues to assist the son for RM600 per month. The natural father earns about RM600 - RM700 per month. The natural mother is now a coffee shop assistant and earns RM250 per month. There is really not much difference between the two as far as incomes are concerned.
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- (d) Love and affection. The infant is very attached to all members of the adoptive family which is not surprising as the infant had been living with them since a tender age. The natural father too has shown love and affection by playing with the infant everyday when he was working for the foster father. The mother's love for her own child has never been questioned. The fact that they want the infant back is proof of their love for the infant. True, they gave their child away but that was because of their belief in the Chinese superstition. It seems to us that their greater natural love for their child has overcome their superstition.
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We are of the view that thus far there are really no grounds why the foster parents should be preferred to the natural parents from the point of view of the welfare of the infant. The learned Judge, however, tilted the balance in favour of the foster parents in these respects and went on to rely on two specific grounds why he held that the natural parents withheld consent unreasonably.

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The first is the *de facto* adoption as evidenced by the temple ceremony. The learned Judge conceded that the natural parents had the right to change their minds but it is obvious from his evaluation of the evidence that the natural parents truly intended to give the infant away in adoption and should not now be permitted to change their minds. He made reference to s. 8, which is a provision as to existing *de facto* adoptions, and said that if the infant had commenced his primary education he would have had by virtue thereof. We think s. 8 has been misconceived in this instance. That section only applies to *de facto* adoptions before the commenced temple ceremony on 11 November 1983. It will defeat the object of the legislature that all adoptions shall be in accordance with Act if the Court were to recognise *de facto* adoptions as a ground for dispensing with the parental consent.

Secondly, the learned Judge held that:

the disruptive effect on the boy of transplanting him from his familiar surroundings where he has lived for nearly 4 1/2 year to his natural parents, would be sufficiently permanent and serious to afford cogent reasons for holding that the consent of the natural parents to his adoption was being unreasonably withheld ...

He considered the reported cases where it was held that a year old baby would not be upset by such a change: *In Re PA (an Infant)* [1971] 115 SJ 586 but a three year old would: *O'Connor v. A & B* [1971] 1 WLR 1227. We would first observe that the natural parents asked for the return of the infant when he was 2 years old. The Court had ordered an early hearing but the actual hearing did not take place until 28 April 1988. The delay is not the fault of the natural parents and we think they should not be disadvantaged because of this. In any event, in *O'Connor's* case, the reason for holding that withholding of consent was unreasonable was because the natural parents were not particularly stable individuals. Here the natural father did not lose touch with the infant. The natural mother visited him when he was in the welfare home by order of the Court before the hearing and the infant was "not frightened or felt uncomfortable with her." We are of the view that change of surrounding will not be disruptive in the instant case. After all the infant is being taken back by his natural parents and is to be brought up together with his twin sister.

In all the circumstances of this case, we were of the view that the natural parents' withholding of consent is not unreasonable. We accordingly allowed the appeal with costs and set aside the order of the learned Judge and ordered the infant to be returned to the natural parents (the appellants) with access to the foster parents (the respondents) under the supervision of the Welfare Officer.

Also found at [1990] 1 CLJ 10

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